No. 201.

Supreme Court of the United States

OCTOBER TERM, 1902.

CLARA PERRY, OWNER OF THE CANAL-BOAT "ROBERT W. PARSONS,"

Plaintiff in Error,

vs.

CORNELIUS L. HAINES,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The sole question involved in this case is as to the jurisdiction of the District Court of the United States, as a Court of Admiralty, over the Erie Canal, or, in other words, whether the Supreme Court of the State of New York has jurisdiction to enforce a lien *in rem* given by the state statute, or whether such lien can be enforced *in rem* only in the Admiralty courts of the United States.

The defendant in error during the period from May 9, 1899, to May 17th, 1899, at Middleport, in the State of New York, at the request of the master of the canal boat "Robert W. Parsons," furnished certain materials and performed certain labor in making repairs upon said boat for which, on May 29th, 1899, he filed a lien pursuant to the General Lien Law (Chap. 418 of the laws of 1897). Thereafter, and on No-

vember 8th, 1899, upon his petition, proceedings were commenced under section 3419, *et seq.*, of the Code of Civil Procedure to enforce said lien against said boat, and a warrant was issued in accordance with the provisions of the Code, to the Sheriff of any county, directing him to seize and safely keep said boat and hold the same to satisfy said claim; at the same time an order to show cause was granted, returnable on November 28th, 1899, why such vessel so seized should not be sold to satisfy the said lien. Before the return day of said order a motion was made based practically upon the papers of petitioner alone, to vacate said attachment upon the ground that the Court did not have jurisdiction. This motion was denied and an appeal was taken from the order denying the same to the Appellate Division of the Supreme Court. This appeal was argued, and said Appellate Division rendered a decision affirming the order appealed from, three Judges concurring in the affirmance with an opinion by Chief Justice Adams, and the other two Judges dissenting, Justice Williams writing the opinion.

Matter of Haynes, 52 Ap. Div. (Sup. Ct. Rep.) 550.

For the convenience of the Court there is appended to this brief a copy of the two opinions rendered upon said appeal, as these are the only opinions which have been given by any Court in this case.

The motion of the owner to dismiss the proceedings having been denied, the proceedings were continued while the appeal was pending, and the owner filed her affidavit (pages 7 and 8) in answer to the petition upon the return of the order to show cause, and, upon the motion for the final order, filed an answer thereto (pages 14 and 15) again raising the question of jurisdiction. From the final order the owner again appealed to the Appellate Division, where the order was affirmed upon the opinion rendered upon the former appeal.

In re Haines, 57 Ap. Div. (Sup. Ct. Rep.) 636.

From the order of affirmance the owner appealed to the Court of Appeals. There the order was affirmed without opinion.

In re Haines, 168 N. Y., 586.

Thereupon this writ of error was sued out from this Court.

The only defense made to the petition and throughout the proceedings, was (pp. 7, 8, 14 and 15) that the State Court was without jurisdiction to proceed to enforce the lien, as it was based upon a maritime contract and should, therefore, only be enforced by proceedings in the United States District Court, inasmuch as these courts are by the Constitution and Laws of the United States given exclusive jurisdiction in proceedings *in rem* in maritime and admiralty cases.

U. S. Const., Art. 3, Sect. 2.
U. S. Rev. Stat., Sect. 563, Sub. Div. 8.

There is no dispute as to the facts. By the stipulation of the parties (p. 11) the facts stated in the affidavit of Clara Perry (pps. 7 and 8) and in the affidavit of Cornelius L. Haines (p. 9) are to be deemed and taken as established in this proceeding.

The boat in question is of more than twenty tons burden and is of the type of boats known as Erie canal boats, without propelling power of its own, but obliged to be towed. For eighteen years it has been employed in commerce and navigation upon the Erie canal and Hudson river, and in the harbor and bay of New York, and the public navigable waters connecting the same, and

> "Has been so employed between ports and places in the State of New York and between ports and places in different states,"

And one specific instance is admitted where the boat was so employed in the season of 1899, in which these repairs were made and the boat seized therefor, between a port of the State of New Jersey and a port of the State of New York.

The specifications of lien (p. 4) which are made part of the petition, the affidavit of Clara Perry, the owner (p. 7), the affidavit of Cornelius L. Haines, the petitioner (p. 9), the affidavit of the master, Levi Perry (p. 10), all show that the work done and materials furnished, for which a lien is claimed and sought to be enforced, were all for making repairs upon the boat at the special instance and request of the master, and were not furnished for building the boat. The lien, therefore, is founded upon a maritime contract. Seizure under the warrant was made the latter part of November, 1899, at Albany, N. Y., while the boat was upon a trip from Buffalo to Brooklyn, N. Y., with a cargo of lumber shipped from Buffalo, November 1st, 1899, consigned to a firm in Brooklyn.

Specification of Errors.

1. The State Courts erroneously held that such courts have jurisdiction to enforce by proceedings *in rem* a lien acquired under the State statute for making repairs to a boat of more than twenty tons burden, employed in the business of commerce and navigation upon the Erie canal and Hudson River, in the State of New York, and upon the harbor and bay of New York, and the public navigable waters connecting the same, and upon which canal, river, harbor and bay commerce and navigation are conducted and carried on between ports and places in different States, and between the United States and foreign countries, and said boat being so employed between ports and places in the State of New York and between ports and places in different States.

2. The State Courts erroneously held that the District Courts of the United States did not have exclusive jurisdiction in such cases.

3. The State Courts erroneously refused to dismiss the proceedings herein for want of jurisdiction.

I.

The original statute of New York providing for liens on vessels was Chap. 482 of the Laws of 1862. By this act it was provided what debts should be a lien, when, how, and where specifications of liens should be filed, and the method of procedure for enforcing them *in rem* by attachment, etc.

This act, however, in so far as it provided for the enforcement of maritime claims *in rem*, was held unconstitutional and infringed upon the exclusive jurisdiction of the Federal Courts over that class of cases.

In re Josephine, 39 N. Y., 19.
Brookman vs. Hamill, 43 N. Y., 554.
Hine vs. Trevor, 4 Wall., 555.
Vose vs. Cockcroft, 44 N. Y., 415.
Poole vs. Kermit, 37 N. Y., Super. Ct., 114.
The Belfast, 7 Wall., 624.

II.

In 1897, the Legislature in enacting a general law in relation to liens (Chap. 418, Laws of 1897, being Chap. XLIX of the General Laws), provided by Art. II. for liens on vessels. The several sections providing for a lien, how obtained, duration, etc., are substantially the same as the Law of 1862 as amended, in force at the time of the adoption of the General Law. All prior laws were thereby repealed.

When it came to providing for the enforcement of the lien, however, the Legislature recognized the force and effect of the above decisions and said: (Sec. 35) "If a lien, created by virtue of this article, is founded upon a maritime contract, it can be enforced only by proceedings in the Courts of the United States, and in any other case, in the courts of this State, in the manner provided by the Code of Civil Procedure."

From this it will be seen that two methods were provided for enforcing the lien, depending upon the contract, whether maritime or not. This was necessary, as the statute provides for a lien where labor or materials are furnished under a contract for building a boat, which the courts uniformly hold is not a maritime contract, and in such a case it must be enforced in the courts of the State, as a court of admiralty would not have jurisdiction of it.

Wilson vs. Lawrence, 82 N. Y., 409, p. 411.
The J. E. Rumbell, 148 U. S., 1.
Citing The Jefferson, 20 How., 393.
The Capitol, 22 How., 129.
Edwards vs. Elliott, 21 Wall, 532.

So that in determining upon the remedy or the forum, it is necessary to determine first whether or not the contract upon which the lien is based is a maritime contract. If it is, then under the statute, as well as under the authorities,

> "it can be enforced *only* by proceedings in the Courts of the United States."

As we have stated, the labor and materials, for which a lien is claimed in this case, were furnished in making repairs, and this is not disputed.

That a contract for making repairs upon a boat is a maritime contract is settled beyond question.

The General Smith, 4 Wheat, 438.
The St. Lawrence, 1 Black, 522.
Peyroux vs. Howard, 7 Peters, 324.
The Lottawanna, 21 Wall, 558.

In the case of the Lottawanna, *supra* the Court says:

> "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State Courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security even when created by State laws."

Even in the dissenting opinion of Clifford, J., in the Lottawanna case, he says:

> "Argument to show that a contract to furnish repairs and supplies, whether to a domestic or foreign ship, is a maritime contract, is hardly necessary, as there is not a well-considered decision to the contrary in our language, and the twelfth Admiralty Rule, throughout all its mutations, from the time it was first adopted to the present time, has always given the District Courts jurisdiction over such contracts, either *in rem* or *in personam*. Both the enemies and the friends of the Admiralty have always concurred in that proposition."

The Appellate Division recognizes this principle by the prevailing opinion of Adams, Ch. J., saying:

> "No one, of course, doubts that the contract and lien for repairs to a vessel plying between New York and Liverpool, whether made in the home or a foreign port, would be maritime in their nature, and consequently clearly within admiralty jurisdiction. The same would doubtless be true of a vessel engaged in navigating a gulf or river which adjoined or emptied into the sea."

The facts now presented clearly bring this case within this rule. This boat navigated not only the Erie Canal, but also the Hudson River, which not only adjoins but empties into the sea, and, as the owner's affidavit shows (p. 7), they

> "Are public navigable waters connecting the Great Lakes of Erie, St. Clair, Huron, Michigan and Superior and their tributary waters with the Atlantic Ocean, and upon which canal and river commerce and navigation are conducted and carried on between ports and places in different States, and between the United States and foreign countries."

And of these latter facts the Court will also take judicial notice.

The proof also shows (p. 8), that

> "Said boat is also so employed in the Harbor and Bay of New York and the public navigable waters connecting the same, and said boat has been so employed between ports and places in the State of New York and between ports and places in different States."

That a contract for making repairs upon a boat is a maritime contract is now fully recognized by this Court by Admiralty Rule 12, adopted in May, 1872, as follows:

> "In all suits by material men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

The only difficulty ever experienced by the courts was in determining the relative bearing or effect arising where the repairs were made upon a ship or vessel in a foreign port; *i. e.*, a port other than the one where the owner resided, and where the repairs were made upon a ship or vessel in her home port. It being well settled that the general maritime law gave a lien for repairs made in a foreign port, but did not give a lien for repairs made in the home port. To obviate this difficulty the several States passed laws, generally similar to our statute, providing for a lien and the method of creating such a lien where repairs were made within the State upon a vessel owned in the State. Subsequently this Court in passing upon the validity, effect, and rank of such liens determined that as to repairs made in a foreign port the general maritime law gave the lien; but as to repairs made in the home port the lien must be given by the statute of the State. And where a lien was given by the statute of the State, then both classes of liens

stood upon the same footing, and were enforceable only in admiralty. In other words, in the one case the lien was given by the general maritime law, in the other by statute, but in both cases after the lien was obtained they were enforceable with like effect in one and the same forum only.

The recent and leading case establishing these propositions is the

J. E. Rumbell, 148 U. S. 1.

decided March 6th, 1893, where the Court sums up the conclusions arrived at by it, and which it deemed settled and established by the decisions of that court, as follows:

> "In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:
>
> "First—For necessary repairs or supplies furnished to a vessel in a foreign port a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. The General Smith, 4 Wheat, 438, 443; The St. Jago de Cuba, 9 Wheat, 409, 417; The Virgin, 8 Pet. 538, 550; The Laura, 19 How. 22; The Grapeshot, 9 Wall, 129; The Lula, 10 Wall, 192; The Kalorama, Id. 204."
>
> Second—For repairs or supplies in the home port of the vessel no lien exists or can be enforced in admiralty, under the general law, independently of local statute. The General Smith and The St. Jago de Cuba, above cited; the Lottawanna, 21 Wall., 558; The Edith, 94 U. S., 518.
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> Third—Whenever the statute of a State gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. The Planter, 7 Pet., 324; The St. Lawrence, 1 Black, 522; The Lottawanna, 21 Wall., 558, 579, 580; Rule 12 in admiralty, as amended in 1872, 13 Wall, XIV.
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> Fourth—This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty. The Moses Taylor, 4 Wall., 411; The Hine, Id., 555; The Belfast, 7 Wall., 624; The Lottawanna, 21 Wall., 558, 580; Johnson vs. Elevator Co., 119 U. S., 388, 397; 7 Sup. Ct. Rep., 254.
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> "The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the Legislature of a State.

> No State legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure. See, in addition to the cases above cited, The Orleans, 11 Pet., 175, 184; Ex-parte McNiel, 13 Wall., 236, 243; The Corsair, 145 U. S., 335, 347; 12 Sup. Ct. Rep., 949."

We would call the attention of the Court also to the very recent case of "The Glide," 167 U. S., 606.

In this latter case, decided May 24th, 1897, in which the Supreme Court reverses the Supreme Court of Massachusetts on the very proposition involved in the case at bar, and holding

> "The enforcement, *in rem* of the lien upon a vessel, created by the statutes of Massachusetts, for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the Courts of the United States."

The Court sums up its conclusions as follows:

> "The maritime and admiralty jurisdiction conferred by the Constitution and Laws of the United States upon the District Courts of the United States is exclusive. A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States or by a local statute, is a *jus in re*, a right of property in the vessel, and a maritime lien to secure the performance of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the District Courts of the United States. When the lien is created by the general maritime law, for repairs or supplies in a foreign port, no one doubts at the present day that under the decisions in 'The Mose Taylor,' 4 Wall., 411, and 'The Hine,' Id., 555, above cited, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of the courts of the State. The contract and lien for repairs or supplies in a home port, under a local statute, are equally maritime and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive."

We can not see how the Supreme Court could have put itself on record in language stronger or clearer than this.

Counsel for defendant in error seeks to make a distinction because this boat is navigating the canal, and therefore a court of admiralty would not have jurisdiction. While this claim was at one time considered of force, whatever doubt existed was entirely removed by the

decision in the case of *ex parte* Boyer, 109 U. S., 629, where the Court held that a canal situated wholly within the State of Illinois was public water of the United States and within the legitimate scope of the admiralty jurisdiction, even though the canal is wholly artificial and is wholly within the body of the State and subject to its ownership and control.

The Appellate Division in its opinion, says, after stating the rule as laid down in *ex parte* Boyer 109 U. S., 629:

> "The rule, as thus declared, falls far short, we think, of sustaining the appellant's contention in the present case. For her boat was but an ordinary canal boat, propelled by horse-power, and was not 'employed in the business of commerce and navigation between ports and places in different states and territories of the United States, upon the lakes and navigable waters of the United States.'"

The facts as heretofore stated, show not only that this is not true, but also bring this case within this rule in *ex parte* Boyer.

III

The Appellate Division lays undue stress upon the character of the vessel and does not give due weight to the navigability of the water upon which the boat is employed.

The character of the water upon which the boat is employed is made the guiding principle to determine as to whether or not the subject of the action is within the admiralty jurisdiction of the Federal Courts.

The rule as established in *ex parte* Boyer, 109 U. S., page 632, is

> "Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of the State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the District Court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State."

We would also call the attention of the Court to the case of *ex parte* Garnet, 141 U. S., p. l., where the Court says, after citing the case of *ex parte* Boyer and others:

> "In all these cases it was held that the admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers. In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or inter-state commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single State."

This latter case is cited in the case of the E. A. Shores, Jr., 73 Fed. Rep., 342, p. 347, where the Court says the Supreme Court holds in effect:

> "That the navigable waters of the United States are national highways and subject to the national jurisdiction; that navigation upon such waters is necessarily national in character, and all vessels engaged therein and all their rights and liabilities are subject to national legislation, without regard to the nature of the trade, whether from port to port in one State or between the ports of different States."

Admiralty jurisdiction is not divested because of any peculiarity in form, size, or means of propulsion; it matters not, it is said, whether they be propelled by steam, wind, or animal power; if they are vehicles of commerce they are, according to the more recent decisions, within the jurisdiction of the admiralty.

The Montello, 20 Wall., 430.
The Daniel Ball, 10 Id., 557.
The General Cass, 1 Brown's Ad., 334.

What are public navigable waters is well defined in the case of the Daniel Ball, *supra*, where the Court says:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

And in the case of Miller vs. Mayor, etc., 109 U. S., 385, p. 395, this definition is adopted in the following language:

> "By 'navigable waters of the United States' are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the States. East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound."

The U. S. Courts have also held in relation to contracts to be performed wholly within a State that that fact does not exclude it from the admiralty jurisdiction of the courts of the United States. The admiralty jurisdiction, conferred by the Constitution upon these courts, extends to all contracts of a maritime character to be performed upon navigable waters.

> The Mary Washington, 1 Abb. U. S. 1, Fed. Cases No. 9229.
> The Belfast, 6 Wall., 624.
> The Leonard, 3 Ben., 263, Fed. Cases No. 8256.
> U. S. vs. Burlington & Henderson Co. Ferry Co., 21 Fed. Rep., 331, p. 336.

And this rule is followed although the boat was built to navigate the canal, and had no means of locomotion in herself.

> The E. M. McChesney, 8 Ben., 150, Fed Cases No. 4463.
> Affirmed 15 Blatch, 183, Fed. Cases No. 4464.
> The Wilmington, 48 Fed. Rep., 566.

In the latter case the Court says:

> "It is now, however, quite well settled that canal boats, lighters, etc., used in harbors as instruments of commerce are, in like manner as sea going vessels, subjects of admiralty jurisdiction, and that contracts with regard to their employment and repair are maritime contracts and matters of admiralty cognizance."

The United States District Court for North. Dist. of New York has held that the Erie Canal and connecting waters are public navigable waters of the United States over which the Admiralty Court has jurisdiction, and exercises jurisdiction over it.

> The Thomas Carroll, 23 Fed. Rep., 912.
> The Ella B., 24 Fed. Rep., 508.

It has also been so held in the Southern District of New York, where the question of jurisdiction over the Erie Canal was directly before the Court.

Maloney vs. City of Milwaukee, 1 Fed. Rep., 611.

Jurisdiction over the Albemarle and Chesapeake Canal was exercised in 1874.

The Olie, 2 Hughes, 12, Fed. Cases No. 10485.

and over the Welland Canal in 1873.

The Avon, Brown, Adm., 170, Fed. Cases No. 680.

and even as early as 1856.

Scott vs. The Young America, Newb. 101, Fed. Cases No. 12549.

It is well known that admiralty assumes jurisdiction not only over canal boats but also over a dredge and scows.

The Alabama, 22 Fed. Rep., 449.

A raft of timber.

Muntz vs Raft of Timber, 15 Fed. Rep., 555.

A steamer of less than five tons burden engaged in carrying freight and passengers upon navigable water.

The Pioneer, 21 Fed. Rep., 426.

A ferry-boat plying between two ports in the same State in a navigable river.

U. S. vs. B. & H. Ferry Co., 21 Fed. Rep., 331.

A dismantled steamboat being fitted for use as a wharfboat.

The Old Natchez, 9 Fed. Rep., 476.

A barge without sails or rudder, used for lightering.

Disbow vs. The Walsh Bros., 36 Fed. Rep , 607.

A bath-house built on boats and designed for transportation.

The Public Baths No. 13, 61 Fed. Rep., 692.

A contract for the repair of scows used in carrying ballast to or from vessels.

Endner vs. Greco, 3 Fed. Rep., 411.

In this case a libel was filed *in personam* to recover the cost of certain repairs upon four scows. Objection was taken to the jurisdiction, the claim being that the contract was not a maritime contract, and that the scows having neither steam power, nor sails, nor rudders, but moved by steam tugs only in port in carrying ballast, and not upon the high seas, they are not ships or vessels, and that if they are ships or vessels, the court had no jurisdiction of a suit *in personam* for repairs furnished to a domestic vessel. The Court, Choate, D.J., held it was a maritime contract and sustained the jurisdiction, and said that the scows were not unlike canal boats and barges, which are now treated as vessels, and, being instruments of commerce, a contract for their repair was a maritime contract because it has relation to trade and commerce, and

> "Some connection with a vessel employed in trade."

As Benedict says in his work on Admiralty, § 213:

> "It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft as an instrument of naval transportation."

See also Benedict's Admiralty, §§ 221, 221A.

And by the Revised Statutes of the United States, Section 3:

> "The word vessel includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water,"

And by Section 542, Revised Statutes of the United States:

> "The District Courts of the Southern and Eastern Districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens and Suffolk, either of seizures made and of matters done in such waters,"

Clearly showing that the waters of the Harbar and Bay of New York are within the admiralty jurisdiction of the Federal Courts.

We think the Appellate Division fell into error in taking judicial notice of the fact

> "That such a boat as the one in question cannot and does not navigate the high seas,"

as the facts admitted in this case show the boat does navigate the high seas in and about the harbor of New York and the coasts of New Jersey; and it is well known that such boats run and carry cargoes from New York to ports and places in Connecticut, New Jersey, Delaware and to Philadelphia, and canal boats built for use upon the Erie Canal navigate Lake Erie and carry cargoes from Cleveland, in the State of Ohio, and Erie, in the State of Pennsylvania, over Lake Erie, the Erie Canal and Hudson River to points upon the seaboard.

IV.

The express limitation contained in the opinion of the Court in ex parte Boyer has no bearing on this case.

The Supreme Court was careful in its opinion in the Boyer case to limit the extent of it so as not to cover

> "Waters wholly within the body of the State and over which vessels cannot so pass as to carry on commerce between places within said State and places in another State or in a foreign country,"

But this express limitation does not apply here for the reason that it is not within the facts established in this case. The boat in question, as stated, did navigate not only the Erie Canal, but the Hudson River, the East River and the Harbor and Bay of New York, and these waters are not wholly within the body of the State, but navigation is carried on upon them between the States, and the Erie Canal and Hudson River are the highways of commerce between the great lakes and the seaboard, and an extensive commerce is carried on over this water not only between ports and places in different States, but between ports and places in the various States and foreign countries.

V.

The Decisions of the United States Supreme Court should be followed as to the scope and extent of the jurisdiction of the Federal Courts.

The Constitution of the United States, Art. III, Sec. 2, declares that,

> "The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

By provisions of the Judiciary Act of 1789, the District Courts of the United States

> "Shall have, exclusively of the courts of the several States, original cognizance of all civil causes of admiralty and maritime jurisdiction."

And this provision is preserved in substantially the same language in U. S. Rev. Stat., §863, Sub. 8th.

The Supreme Court has explained at length, in repeated adjudications, the scope and extent of this jurisdiction as herein before set forth, and its later decisions, conveyed in no uncertain language, should be adopted and followed. It was a long, hard struggle in the Supreme Court to arrive at a final determination, satisfactory to all the members of that court, but it was finally reached, and whatever contradictions or inconsistencies there may have been in the earlier cases, and in some of the dicta contained in some of the opinions, they have been overruled and explained away, so that the final result is a consistent, uniform and well understood scheme of jurisdiction, satisfactory not only to the bench and bar, but to all citizens, as their rights and remedies are well defined and well understood. The courts, respectively, of the States and of the nation, no longer strive to reserve each to themselves jurisdiction other than such as the general scheme of our government designs should be administered by them, but each, graciously and gracefully yields to the other within their respective spheres. This comity now existing and well recognized is well expressed by Chief Justice Andrews as follows:

> "On a question of statutory construction of an Act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court. This principle is especially important to be observed in such a case, in view of the relation between the Federal and State courts, not exercising, in all cases, a co ordinate jurisdiction, but engaged in the administration of justice to a great extent between persons who are citizens both of a State and of the

United States. The decisions of the tribunals of a State as to the true construction of the statutes of its own sovereignty are followed by the Federal courts, and it would be most unseemly and produce great confusion if State courts should refuse to adopt the construction of the Supreme Court of the United States, of Federal statutes."

York vs. Conde, 147 N. Y., 486, p. 491.

VI.

Careful examination and comparison of the cases in the Supreme Court and in the New York Court of Appeals based thereon, with the recent decisions of the Supreme Court, will demonstrate that the construction contended for by the plaintiff in error is the only correct one, and that the conclusion reached by the Appellate Division is not now justified.

The extent of admiralty jurisdiction in the United States courts, and the construction to be given to that provision of the Constitution conferring this jurisdiction, and the statute of 1789 passed to carry it into effect, early engaged the attention of the Federal Courts and was one upon which widely different views were entertained, as upon all questions involving the determination of the respective powers of the Federal and State governments.

The result attained, the establishment of that jurisdiction as now recognized in its full breadth and meaning, was reached by slow degrees, after repeated argument at the bar, and earnest discussion between the members of the court in consultation. As was stated by the court in the Hine vs. Trevor, 4 Wall., 555:

> "The history of the adjudications of this court on this subject which it becomes necessary here to review, is a very interesting one, and shows with what slowness and hesitation the court arrived at the conviction of the full powers which the Constitution and acts of Congress have vested in the Federal judiciary. Yet as each position has been reached, it has been followed by a ready acquiescence on the part of the profession and of the public interested in the navigation of the interior waters of the country, which is strong evidence that the decisions rested on sound principles, and that the jurisdiction exercised was both beneficial and acceptable to the classes affected by it."

The situation of the thirteen original States along the Atlantic seaboard at first led to a recognition of the limit to that jurisdiction established by the decisions of the English courts as determined by the ebb and flow of the tide, and in this respect these decisions were rigidly adhered to.

It was a settled principle of English jurisprudence at the time of the adoption of our Constitution, that the admiralty jurisdiction was limited to cases arising upon the sea or waters within the ebb and flow of the tide, and in the first case in which it became the duty of the Supreme Court authoritatively to define the limits of admiralty jurisdiction so far as it depended upon locality, this principle was unanimously adopted. (The Thomas Jefferson, 10 Wheat, 428, decided by the Supreme Court in 1835.)

But in the case of Waring vs. Clarke, 5 How., 441, decided in 1847, the Supreme Court refused its assent to the English rule excluding jurisdiction if the locality was *infra corpus comitatus.*

Its interpretation, in the case of The Thomas Jefferson, of course excluded as well the Great Lakes, as all navigable streams beyond the influence of the ebb and flow of the tide. But the commerce carried on there was small compared with the magnitude it has since attained. Nevertheless, the increasing importance of its commerce was already sufficient to awaken solicitude for its prosperity and its exclusion from the admiralty jurisdiction was contemplated with regret.

This led to the passage of the Act of February 26th, 1845, entitled

> "An Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same."

The constitutionality of this Act was questioned. It was defended and its constitutionality declared at first, as being within the powers of Congress to regulate commerce among the several States; but the Supreme Court held the Act to be wholly indefensible on that ground, but it was adjudged valid

> "On the ground that the Lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted,"

and the Court held

> "The Lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

And after quoting from the Judiciary Act of 1789 the Court says:

> "The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."

And the Court was led to the conclusion that the rule restricting the admiralty jurisdiction to tide waters was inapplicable to this country and ought to be discarded. It accordingly overruled the case of the

"Thomas Jefferson."

Holding that it was founded in error and it was the duty of the Court not to perpetuate it.

The Genesee Chief, 12 How., 443.

The next case coming before the Supreme Court, involving jurisdiction, was the Magnolia, 20 How. 296, determined at the December term, 1857. Jurisdiction was denied upon the ground that the collision, for which the action was brought to recover damages, was within the body of the county and was above tide-water. The Court held, upon the authority of the case of Waring vs. Clarke, that it was no objection to the jurisdiction that the tort was committed within the body of the county. A distinction, however, was sought to be made as to the point decided in the case of the Genesee Chief, claiming that that decision was based upon the Act of 1845, and was to be confined to the Great Lakes and was not to be extended over waters and subjects not included within the Act; but the Court held that the judicial power was extended by the Constitution to all cases of admiralty and maritime jurisdiction, and that the Act of 1845 was simply a declaratory act.

We pass over for the present the cases of Allen vs. Newbury, 21 How., 244, and McGuire vs. Card, 21 How., 248, decided in December, 1858, which we will discuss later.

At the December term, 1866, two cases were presented involving this question of jurisdiction, The Moses Taylor, 4 Wall., 411, and The Hine vs. Trevor, 4 Wall., 555. The first arose in California and the second in Iowa. Both involved the question of the validity of State Statutes giving a lien against ships and vessels and providing for their inforcement *in rem* by proceedings in the State Court. The former related to a maritime contract, the latter to a collision. In both, the Court held that the State statute, in so far as it authorized actions *in rem* against vessels in admiralty and maritime causes, was invalid, and that jurisdiction in such causes was vested exclusively in the Federal Courts.

The next case is that of The Eagle, 8 Wall., 15, which was decided in 1868, which arose in the Eastern District of Michigan, and the libel was filed to recover damages sustained by collision. It was contended that as the collision took place in the Detroit River on the Canadian side, and as there was no law in force in Canada giving a lien, the United States District Court had no jurisdiction. The Court held a plea to the jurisdiction bad upon the authority of the Genesee Chief, and as objection was taken that the case was not brought within the requirements of the Act of 1845, the Court passed upon that statute, and held that, since the decision of the case of the Genesee Chief, the Court must regard District Courts as having conferred upon them a general jurisdiction in admiralty over all public navigable waters, whether influenced by the tide or not, by the ninth Section of the original Act of 1789, and the enabling Act of 1845 therefore, had become inoperative and ineffectual as a grant of jurisdiction, and the Court held it to be obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which was rather a mode of exercising jurisdiction than any substantial part of it. This conclusion, relative to the Act of 1845, arrived at by the Supreme Court, was accepted in the Revision of the Statutes of the United States made in 1874, and the Act was omitted from the Statutes, excepting the clause giving the right of trial by jury. (§ 566, U. S. Rev. Stat.)

The case of the Daniel Ball, 10 Wall., 557, was decided at the December term, 1870. It is important as defining "navigable waters"

as before stated, and also from the fact that the boat was employed in the business of commerce between places in the same State, but, nevertheless, was held subject to the laws of Congress.

At the same term, the case of Insurance Co. vs. Dunham, 11 Wall, 1, was decided. We would call attention particularly to this case in view of the claim made below by counsel, that in the case at bar the contract for repairs was made on land, and performed wholly and entirely on land, and, therefore, was not a maritime contract, as the Court discusses at length what are maritime contracts, and, after stating that jurisdiction had been sustained by that Court in cases of suits by ship carpenters and material men on contracts for repairs, materials and supplies, says that the contract

> "Whether maritime or not maritime, depended, not on the place where the contract was made, but on the subject matter of the contract. If that was maritime the contract was maritime."

We then come to the case of the Lottawanna, 21 Wall., 558, determined in the Supreme Court in 1874. The libel originally was filed for mariner's wages, and the contest was over a surplus in the registry of the Court. The main question determined was, whether the furnishing to a vessel on her credit at her home port, needful repairs and supplies, creates a maritime lien, and the Court settled the question in this country that material men furnishing supplies and repairs to a vessel in her home port do not thereby acquire any lien upon the vessel by the general maritime law as received in the United States. But the Court held that the several States could by statute create liens, and that liens so created by the laws of a State in favor of materi[illegible] men for furnishing repairs and supplies to a vessel in her home port are valid, though the contract to furnish the same was a maritime contract and can only be enforced by proceedings *in rem* in the United States Courts. The lien having been given by statute, those courts alone had the power to enforce it.

This case seemed to have settled all questions of jurisdiction in the United States Courts in admiralty. For a number of years, however, doubt existed as to the jurisdiction of admiralty over canals wholly within a State. In April, 1880, the question came squarely before the

District Court for the Southern District of New York, in the case of Maloney vs. the City of Milwaukee, 1 Fed. Rep. 611, and it was there held that the Court had jurisdiction *in rem* upon a libel filed to recover damages for collision between two canal boats, the collision having taken place upon the Erie Canal, about one hundred miles east of Rochester in the County of Monroe. The Court based its decision upon the cases in the Supreme Court before referred to.

The suggestion contained in the opinion that the question must doubtless soon receive full consideration and a final determination in the Supreme Court was realized, for it came before the Supreme Court in 1884, in the *ex parte* Boyer, 109 U. S., 629, heretofore discussed.

We would also call attention to the mutations in the Twelfth Admiralty Rule of the Supreme Court. The history of this rule is important in considering the cases on jurisdiction determined not only in the Supreme Court, but particularly in the cases in the Court of Appeals referred to, the opinions in which would indicate that the effect of these changes had not been fully comprehended. We can do no better than to call attention to the opinion of Mr. Justice Gray in the case of The Glide *supra*, where the changes in this rule and the effect of such changes are fully discussed, and in which he states that

> "The question of the extent of the admiralty jurisdiction of the courts of the United States over cases like that now before the Court became at one time entangled in the question of the effect of the regulations of pleading and procedure in admiralty by this Court under the power conferred upon it by the Acts of Congress."

Which authorized the Court to promulgate rules of practice in cases of admiralty and maritime jurisdiction. As will be seen, the original rules adopted in 1844 to take effect September 1st, 1845, authorized proceedings *in rem* in cases of domestic ships where a lien was given by the local law. This rule was changed at the December term, 1858, to take effect May 1st, 1859, giving a proceeding *in personam*, but not *in rem* in cases of domestic ships. The rule was changed on May 6th, 1872, to the form in which it now stands as above quoted, and it was under the rule in this form that the case of The Lottawanna was decided.

Counsel for defendant and the Appellate Division lay great stress

upon the case of Allen vs. Newbury, 21 How., 244, and McGuire vs. Card, 21 How., 248. Both of these cases were decided in the December term, 1858. The Allen case arose on an appeal from the District Court of Wisconsin. A libel was filed in admiralty to recover damages to goods for loss on contract of affreightment. The Court based its decision solely upon the ground that the Act of 1845 did not give jurisdiction, as it did not apply to commerce between ports of the same State, and it was contended that if jurisdiction was not vested by this Act that the Court would not have jurisdiction of the case, and it sought to justify the Act as one to regulate commerce.

This view of the Act, however, as has been stated, was expressly repudiated by the Supreme Court in the case of The Eagle, decided in 1869.

The McGuire case was based upon the decision of the Court in the Allen case, and the Court calls attention to the fact that they had amended the Twelfth Rule so as to exclude the right of proceeding *in rem* in admiralty upon the lien acquired by State statute. Both of these cases, however, are expressly overruled by the Supreme Court in the case of The Belfast *supra*, decided in 1868. and in the case of The Lottawanna, Clifford, J., in his opinion criticises them and states that

"They were both distinctly overruled."

These two cases, therefore, have no weight or authority whatever and should not be considered as in any way affecting the question in the case at bar.

Counsel for defendant cites the case of The Ann Arbor, Fed. Cases No. 407, affd. No. 408. That case was determined in 1854 and was an interpretation of the law as then understood. That it is not good authority now and the reason why it is not, clearly appears from the note following the report in Federal cases to which I would respectfully refer the Court without further comment.

We come now to the consideration of the cases of the New York Court of Appeals relied upon by the defendant and cited in its opinion by the Appellate Division. The case of Shepard vs. Steele, 43 N. Y., 52, was decided in October, 1870. The action was upon a bond given to discharge a vessel attached in proceedings under the statute to en-

force a lien. The lien claimed arose for blacksmith work done in *building* the boat. The court in its opinion clearly recognizes the distinction existing between contracts for building a boat, which are not maritime and not enforceable in admiralty, and, therefore, may be enforced under the statute in a State court, and contracts for making repairs and furnishing materials to a boat in commission, which are maritime and must be enforced in admiralty; and it was held, that not being a maritime contract the bond could be enforced and the plaintiff was entitled to recover.

We would again call the attention of the court to the fact conceded in this case, that the contract in suit was for making repairs to, and not for building, a boat.

The case of Brookman vs. Hamill, 43 N. Y., 554 was decided May, 1871. This action also was upon a bond given to discharge a vessel from attachment. The claim for which a lien was filed was for wharfage. The court held that a wharfage demand was a maritime contract enforceable in admiralty and the State court therefore had no jurisdiction by attachment under the statute, and the court says, page 563:

> "All State statutes which attempt to confer upon State courts a remedy for marine torts or marine contracts by proceedings strictly *in rem*, are void. The exclusive character of the jurisdiction of the courts of admiralty, when it exists, cannot be affected by the question of lien or the form of remedy."

The court cites and comments upon the cases of McGuire vs. Card and Allen vs. Newbury, although it admits that the doctrine of these cases has been denied in the case of the Belfast. It also comments upon the Twelfth Rule in Admiralty as it then existed (May, 1871), which did not then permit a libel *in rem* in cases of domestic ships for supplies, repairs, or other necessaries, and says:

> "In view of the doctrine of the case of The St. Lawrence, I can see no want of power in the Supreme Court, should it see fit to do so, to restore the rule of 1844, or to allow a remedy *in rem* to material men in all cases."

This the Supreme Court has done as above stated.

The case of Happy vs. Moser, 48 N. Y., 313, was also an action upon a bond given to discharge a vessel seized under a warrant to enforce a lien claimed for certain lumber furnished and used in the build-

ing or construction of a barge. The court does not discuss the question as to jurisdiction to enforce the lien in the State court, but reversed the case because a note had been given for the debt, which operated to extend the time of payment, and the proceedings having been commenced before the note was due, they were prematurely brought, and also because improper evidence had been admitted.

In Delaney vs. Brett, 51 N. Y., 78, decided in September, 1872, the action was upon a bond given to discharge a vessel seized under a warrant to enforce a lien claimed for two sails furnished a seagoing vessel, whether in the building or after she was in commission does not appear. The court does not consider the question as to jurisdiction to enforce the lien in the State court. The case of Mott vs. Lansing, 57 N. Y., 112, was similar to the last case and the question of jurisdiction was not raised.

In the case of Poole vs. Kermit, 59 N. Y., 554, the court held the lien could not be enforced, inasmuch as it was claimed for work and materials furnished to a seagoing vessel, and was a maritime contract.

The case of King vs. Greenway, 71 N. Y., 413, decided December, 1877, was upon a bond given to obtain the release of a canal boat from attachment. A lien was claimed for machinery put into the boat, and the court held that the persons furnishing the machinery were builders, within the meaning of the Act giving a lien, and based its decision upon the authorities holding that a building contract is not maritime.

So also in the case of Wilson vs. Lawrence, 82 N. Y., 499, decided in November, 1880, the action was upon a bond, a lien being claimed for furnishing sails in the construction of a schooner. Here the Court held the contract to be for building, and not maritime.

The case of Fralick vs. Betts, 13 Hun, 632, was decided in 1878, and should be given no force or weight as an authority, as what was stated by the Court in that case in *obiter* and based upon McGuire vs. Card and Allen vs. Newbury, both of which have been overruled by the Supreme Court, as above stated.

The Appellate Division seems to have overlooked a case in the Supreme Court of New York clearly sustaining our views. It is the case of Ryan vs. Hook, 34 Hun, 185 (General Term, Fourth Department), decided in 1884, in which the opinion is by Judge Vann, now

of the Court of Appeals, in which jurisdiction in admiralty was sustained over a canal boat, a quarter deck scow without masts or steam power, used and employed upon the Erie Canal and Hudson River. The Court says (p. 187):

> "After some conflict among the the earlier decisions of the Federal courts, it seems now to be settled that the admiralty and maritime jurisdiction of the District courts extends not only to waters where the tide ebbs and flows, but also to all navigable waters of the United States, even including a river lying wholly within the boundaries of a State, when by its connection with other waters it forms a continuous highway over which commerce may be carried on with other States or foreign countries."

(Citing cases hereinbefore discussed.)

> "While the jurisdiction of the District courts over the waters traversed by the 'William Roberts' cannot well be disputed, a question is raised as to the jurisdiction of those courts over a canal boat."

After a discussion of the various cases bearing upon this question, the Court concludes (p. 188):

> "The weight of authority seems to be that where the services were maritime in nature, and were performed for the benefit of a canal boat without means of propulsion on board, but while it was engaged in navigating by means of towage, the navigable waters of the United States, the Admiralty Court has jurisdiction." See also,
>
> Murphy vs. Salem, 1 Hun, 140.
>
> Chisholm vs. North Trans. Co., 61 Barb. 363, p. 388 *et seq.*

The decisions of the Court of Appeals however, if they are in any way construed as applicable in the case at bar, are all prior in point of time to the decisions of the Supreme Court in the case of the Lottawanna, *ex parte* Boyer, The J. E. Rumbell, *ex parte* Garnette, and The Glide, and should have no binding force, but effect should be given to the decisions of the Supreme Court in these cases, and its construction of the Constitution and Statutes of the United States as to the jurisdiction of the Federal Courts in cases of admiralty and maritime jurisdiction should be adopted and followed. The Supreme Court has recently in an interesting and important case removed to it by writ of certiorari issued to the Circuit Court of Appeals for the

Second Circuit, and twice argued in the Supreme Court, held that it is settled

> "That the local decisions of one or more States cannot, as a matter of authority, abrogate the maritime law."

Workman vs. The Mayor, etc., 179 U. S., 552, p. 563. And the Court cites and quotes with approval both from the case of The Lottawanna and from The J. E. Rumbell.

See also Benedict's Admiralty, §§ 313, 313 A, 313 B.

VII.

Consideration of this jurisdictional question has often been embarassed and confused by failure to discriminate between a maritime *contract* and a maritime *lien*, and defendants counsel has fallen into this error. It is well settled, by numerous decisions, that jurisdiction in admiralty as to contracts depends upon the nature and subject-matter of the contract; that is, having reference to maritime service or maritime transactions.

> "A sure guide is to be found in the relation which the cause of action has to a ship, the great agent of maritime enterprise, and to public navigable waters as a highway of commerce. Where there is navigable water, and ships and vessels, these are the subjects of the maritime law. If a case relate to a ship, or to commerce on navigable waters, then it is subject to maritime law, and is a case of admiralty and maritime jurisdiction."

Having then a maritime contract, a party is entitled to proceed in admiralty to enforce it. He may proceed in one of two ways. He is always entitled to proceed *in personam*. He may also proceed *in rem* if he has a lien. For example, a contract to repair a boat is a maritime contract, and an action may be brought in admiralty *in personam* to recover for the repairs, but the person making repairs has not always a lien which he can enforce *in rem*. If the repairs are made upon a boat in a foreign port, the general admiralty law gives a lien, but if made in her home port there is no lien unless given by local statute. But having a lien, however given, one may proceed *in rem*

to enforce it. This is the remedy afforded for the enforcement of liens of that character. A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; the only object of the proceeding *in rem* is to make this right, where it exists, available, to carry it into effect. It subserves no other purpose.

The lien and the proceedings *in rem* are, therefore, correlative; where one exists, the other can be taken and not otherwise. This right of action *in personam* in admiralty, although a libel *in rem* might not be maintained, is clearly pointed out by the Supreme Court in the recent case of Workman vs. The Mayor, etc., 179 U. S., 553, at page 573, where it was held that the City of New York was liable *in personam* for damages occasioned by its fire tug in collision. Therefore, in an examination of the cases, this distinction must be kept in mind. Frequently a liable *in rem* is filed, and the question of jurisdiction being raised, the Court will hold that the libelant never had a lien, or has lost it, and will dismiss the libel, where if a libel *in personam* had been filed, the contract being a maritime contract, the jurisdiction would have been sustained.

Counsel criticises the citation of cases where the cause of action was for damages for collision as having no bearing, and says the principle adopted in *ex parte* Boyer does not apply, because it was a collision case, and claims a different rule applies than in the case at bar upon contract. He does not show any distinction. There is none so far as the question here is concerned. It is true that the jurisdiction of the admiralty over maritime torts depends upon locality, i. e., the tort must have been committed upon public navigable waters. But as to the water, the same test has always been applied to contracts as to torts, and an examination of any or all of the cases on this subject will show that no distinction between the two kinds of cases has ever been made by any of the courts other than as above stated, that locality governed in tort and subject matter in contract. Having a maritime tort, or a contract relating to maritime affairs, upon public navigable waters, admiralty would have jurisdiction. Reference to the opinion

of the Supreme Court in Insurance Co. vs. Dunham, 11 Wall., 1, where the results arrived at by the Court are stated, will show that no distinction is made between the two classes of cases. There the Court says:

> "As to the *locus* or territory of maritime jurisdiction — that is, the place or territory where the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character — a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide."

Examination of the cases cited and quoted above will show that the difficulty encountered by the Supreme Court has always been, in both classes of cases, in determining what are public navigable waters of the United States. If the injury was committed, or the contract related to an instrument of commerce, upon water determined to be public navigable water, then admiralty had jurisdiction of the subject of the action in all cases in proceedings *in personam*, and in all cases *in rem*, if there was a lien.

Counsel in his brief says:

> "In the case of repairs where the common law gave a lien, there is no question but that State courts are authorized to enforce that lien by applying a remedy provided by a State legislature."

The only lien known to the common law was a possessory lien. A person making repairs upon a boat, or a watch, or a wagon, or other article of personal property, has a lien upon it for the value or amount of materials and labor put into the repairs, so long as he retains possession, until his claim is paid; but the moment the article passes from his possession his lien is gone, and his only remedy then is an action at law for the price. So, on a contract of affreightment by water, the carrier has a lien on the cargo for his freight, but it is a possessory lien, and the moment he delivers the cargo into the possession of the consignee his lien is gone and with it his right to proceed *in rem*. It is a maritime contract enforceable in admiralty, and if possession is retained the possessory lien acquired may be enforced *in rem*, but if the lien is lost the libel must be *in personam*. The lien sought to be enforced here is not a common law lien. Possession had been parted

with, and the lien was acquired under the statute, and it is sought to enforce it *in rem* in the State court.

As was explained by the Court in the case of The Moses Taylor:

> "The action against the boat by name, authorized by the statute, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is adjudged and sentenced accordingly."

And the statement of the Court in that case applies equally here:

> "The case before us is not within the saving clause of the 9th Section. That clause only saves to suitors, 'the right of a common law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

As appears by the specifications filed (p. 4) the credit was given to the boat and the proceedings were taken under the statute to perfect a lien. Having complied with the statute and obtained a lien, petitioner had two remedies. He could continue his proceedings under the statute and enforce his lien in admiralty, or he has his right of action at law, and could have waived his lien and brought an action at law in the State court against the owner.

His specifications show also (p. 4) that the owner of the boat was a resident of the State, so that no difficulty would have been encountered in obtaining service of the summons and complaint in the action.

But as stated, if the petitioner was reluctant to do this, lest he might not obtain satisfaction of his judgment, and preferred to rely upon his lien and the remedy given by the statute, he must enforce his lien in admiralty, pursuant to the statute as it is founded upon a maritime claim. This works no hardship in this case, nor in any other case.

The relief given in admiralty in the United States courts is as effectual, in fact more so, than it would be in the State court. For, as explained in the case of The Moses Taylor:

> "It is this dominion of the suit in admiralty over the vessel or thing itself, which gives to the title made under its decrees validity against all the world. By common law process, whether of mesne

> attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title and not the property itself, which is sold."

In other words, if there was a mortgage upon the boat, the lien acquired under the statute and enforced by proceedings in the State court culminating in a sale, would result only in conferring title subject to the lien of the mortgage, but if the lien is enforced in a court of admiralty it would take precedence over the mortgage. The mortgage would be cut off by the sale and the title acquired would be full and perfect and vest absolute title to the boat free and discharged of any and all liens. This result is clearly expressed and shown in the case of The J. E. Rumbell. Furthermore the expense of thus proceeding in admiralty is much less than the expense incurred under the statute. This is shown by the result in these proceedings where the expenses amounted to more than the boat sold for.

VIII.

It being conceded that the contract and lien for repairs to a vessel are maritime in their nature and consequently within admiralty jurisdiction, as is admitted by the Appellate Division, and it being stipulated as a fact that the boat in question is, and has been, employed in commerce and navigation between ports and places in the State of New York, and between ports and places in different States, over public navigable waters upon which interstate commerce and navigation are conducted and carried on, as is stipulated in this case, we confidently claim that the State Courts of New York are without jurisdiction in this proceeding; that the jurisdiction of such proceedings is vested exclusively in the District Courts of the United States in admiralty and the judgment of the State Court should be reversed with costs.

MARTIN CLARK,
Attorney for Plaintiff in error,
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SUPREME COURT—APPELLATE DIVISION, FOURTH DEPARTMENT.

In the Matter of the Application of Cornelius L. Haines to Enforce a Lien against the canal boat Robt. W. Parsons.

CLARA PERRY,
Appellant.

ADV.

CORNELIUS L. HAINES,
Respondent.

Appeal by Clara Perry, the owner of the canal boat Robt. W. Parsons, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the County of Niagara on the 28th day of December, 1899, denying her motion to vacate an attachment granted in the action and to set aside all proceedings thereupon.

MARTIN CLARK,
For the Appellant.

GEORGE F. THOMPSON,
For the Respondent.

ADAMS, Presiding Judge.

This is an appeal from an order of the Erie Special Term denying a motion made by the appellant, Clara Perry, the owner of the canal boat Robt. W. Parsons, to dismiss the proceedings herein upon the ground that the Supreme Court is without jurisdiction to entertain the same.

The undisputed facts of the case are that the Robt. W. Parsons is an ordinary canal boat, navigating the Erie canal and the Hudson river; that in May, 1899, the petitioner made certain repairs to that boat at his dry dock in the village of Middleport, situated on the Erie canal, in Niagara county, and furnished the necessary material and labor therefor; that such repairs, labor and materials amounted in value to the sum of one hundred and fifty-four dollars and forty cents, of which sum ninety dollars and ten cents have been paid, and that a

balance of sixty-four dollars and thirty cents remains due and unpaid, for which amount specifications of lien were filed under the General Lien Law of this State. (Laws of 1897, chap. 418, art. 2.)

By section 35 of the article referred to it is provided that

> "If a lien, created by virtue of this article is founded upon a a maritime contract, it can be enforced only by proceedings in the courts of the United States, and in any other case, in the courts of this State, in the manner provided by the code of civil procedure."

No criticism is made as to the regularity of the petitioner's proceedings, provided he is entitled to invoke the aid of a State court in enforcing his lien; but it is contended that the contract out of which his right to a lien arose is maritime in its nature, and that the proceeding is, therefore, one of which a State court cannot take cognizance, inasmuch as the District Courts of the United States are by the Constitution and laws given exclusive jurisdiction of proceedings *in rem* in maritime and admiralty cases. (U. S. Const. art. 3, paragraph 2; Act of Congress of Sept. 24, 1789, chap. 20, paragraph 9 [1 U. S. Stat. at large, 76]; U. S. R. S. paragraph 563, subd. 8; The Glide, 167 U. S. 606.)

The question which is thus presented for our consideration is one which has provoked much discussion, and one concerning which the State and Federal courts have apparently entertained and expressed somewhat diverse views; but we think this diversity is due to the difficulty which necessarily attends any attempt to draw a line which shall determine in each individual case just when a vessel so far ceases to navigate domestic or inland waters as to become subject to maritime jurisdiction.

No one, of course, doubts that the contract and lien for repairs to a vessel plying between New York and Liverpool, whether made in a home or a foreign port, would be maritime in their nature, and consequently clearly within admiralty jurisdiction. The same would doubtless be true of a vessel engaged in navigating a gulf or river which adjoined or emptied into the sea (Poole vs. Kermit, 59 N. Y. 554; The Glide, supra), but it has been repeatedly held that our State courts have jurisdiction in cases of repairs made and supplies furnished

of water wholly within the State, such, for instance, as the Erie canal. (Sheppard vs. Steele, 43 N. Y. 52; Brookman vs. Hamill, Id. 554; King vs. Greenway, 71 Id. 413; Fralick vs. Betts, 13 Hun, 632.)

The truth of this assertion will doubtless be conceded, but it is claimed that a comparatively recent decision of the Supreme Court of the United States has virtually overturned the doctrine of the cases cited, and is authority for the proposition that even so insignificant a craft as a canal boat, engaged in navigating an artificial waterway which is wholly within the borders of a State, is subject to admiralty jurisdiction, and consequently that a lien for repairs to the same cannot be enforced in a State court. (Ex parte Boyer, 109 U. S. 629.)

It is not to be denied that the principle enunciated in the case above cited, and which apparently constituted the appellant's main reliance in this case, does have a tendency to extend admiralty jurisdiction to a point somewhat in advance of any theretofore attained, but when the facts in that case are carefully examined it will be seen, we think, that they bear no analogy to those of the one we are now considering.

It seems that the controversy there arose out of a collision between two canal boats while they were navigating the Illinois and Michigan canal. Although this canal is wholly within the territorial bounds of the State of Illinois, it was constructed upon lands the use of which is vested in that State by the United States, upon the condition that it should forever remain a public highway for the use of the government. Moreover, its dimensions are such as to enable vessels to pass from the Mississippi river into Lake Michigan and thus carry an interstate commerce. The two canal boats in question were propelled by steam and were enrolled and licensed for the coasting trade and were actually employed in the business of commerce and navigation between different ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States. A libel in admiralty was filed by the owner of one of the boats, but the Court found that both parties were in fault and adjudged that each should pay one-half of the damages occasioned by the collision. One of the owners thereupon presented a petition asking for a writ of prohibition to restrain further proceedings in the suit upon the ground of want of jurisdiction of the

District Court as a court of admiralty. But upon the foregoing facts the prayer of the petition was denied, the Supreme Court, by Mr. Justice Blatchford, saying that,

> "Navigable water *situated as this canal is*, used for the purposes for which it is used, *a highway for commerce between ports and places in different States, carried on by vessels such as those in question here*, is public water of the United States and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and Statutes of the United States, even though the canal is wholly artificial and is wholly within the body of a State and subject to its ownership and control,"

to which conclusion, however, the learned justice was careful to add:

> "This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; *and no opinion is intended to be intimated as to jurisdiction in such a case.*"

The rule, as thus declared, falls far short, we think, of sustaining the appellant's contention in the present case. For her boat was but an ordinary canal boat, propelled by horse power, and was not

> "Employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States."

On the contrary, its navigating ventures were confined to the Erie canal and the Hudson river. It is true that the latter stream finds its way to the Atlantic ocean, and that one of its banks is for a short distance within the territorial bounds of the State of New Jersey; but the Court will take judicial notice that such a boat as the one in question cannot and does not navigate the high seas. The purpose for which it was constructed and used was doubtless to engage in commerce between the City of New York and various points upon the Erie canal, in the western part of the State, and while, in order to carry out this business, it was necessary that it should be towed through the Hudson river, we do not think that for that reason, or for any other which the record discloses, it can be successfully asserted that its sole purpose and occupation was not that of navigating inland and domestic waters.

If the appellant's contention is well founded then the State courts are deprived of all jurisdiction to enforce a lien for repairs made to

any boat navigating the waters of the Erie canal, however insignificant they may be, because, forsooth, the canal connects with a stream which ultimately empties into the Atlantic ocean, and by following the course of which the boat might reach the same destination, although it had no occasion to do so and would be pretty certain to go to the bottom if so perilous a voyage were attempted. We do not believe that the case of Boyer (supra) is authority for any such startling doctrine, and we must refuse to give to it that force and effect until compelled so to do by a decision more directly in point than that appears to be.

In this connection it is perhaps proper to add that the more recent decisions of the same tribunal to which our attention has been directed (Matter of Garnett, 141 U. S. 1; The Glide, supra) simply reiterate the doctrine of the Boyer case and apply it to facts that are even less analogous to those of the case at bar. It follows that the order appealed from should be affirmed.

All concurred except Williams and Laughlin, J. J., dissenting.

Williams, J. (dissenting):

The proceeding was brought under Section 3419 *et seq.* of the Code of Civil Precedure to enforce a lien for repairs upon a canal boat. These sections provide for the proceedings to enforce liens upon vessels, created by virtue of article 2 of the Lien Law, *not based upon a maritime contract.* Article 2 of the Lien Law (Chap. 418, Laws of 1897) provides for liens upon vessels for debts not liens under the Maritime Law; and section 35 provides,

> "If a lien created by virtue of this article is founded upon a maritime contract, it can be enforced only by proceedings in the courts of the United States, and in any other case, in the courts of this State, in the manner provided by the code of civil procedure."

The appellant claims that the lien in question was founded upon a maritime contract and can, therefore, be enforced only by proceedings in the United States courts. There is no dispute but that the lien here was for labor and materials used in making repairs upon the canal boat, which was navigating the waters of the Erie canal and Hudson river.

The repairs were made in May, 1899; the lien was filed during the

same month, and the seizure under the warrant was made the latter part of November, 1899, at Albany, N. Y., while the boat was upon a trip from Buffalo to Brooklyn, N. Y., with a cargo of lumber shipped from Buffalo November 1, 1899, consigned to a firm in Brooklyn. The law is well settled, as stated in the case of The Glide (167 U. S. 606):

> "The inforcement, *in rem*, of the lien upon a vessel, created by the public statutes of Massachusetts, * * * for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the courts of the United States."

The Court in that case, after an extended review of the cases, said:

> "In conclusion, the considerations by which this case must be governed may be summed up as follows:
>
> The maritime and admiralty jurisdiction conferred by the Constitution and laws of the United States, upon the District Courts of the United States is exclusive. A lien upon a ship for repairs or supplies, wheather created by the general maritime law of the United States or by a local statute, is a *jus in re*, a right of property in the vessel and a maritime lien, to secure the performance of a maritime contract, and, therefore, may be enforced by admiralty process *in rem* in the District Courts of the United States. When the lien is created by the general maritime law for repairs or supplies in a foreign port, no one doubts at the present day that, under the decisions in The Moses Taylor and The Hine (4 Wall. 411, 555), above cited, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of the courts of the State. The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive,"

The only question here, therefore, is whether the canal boat in question, navigating the Erie canal and the Hudson river, is such a vessel as is covered by the law relating to maritime contracts.

The claim made by the respondent is that the admiralty jurisdiction of the United States courts is confined to such vessels as navigate the high seas, and does not extend to boats engaged only in commerce between different points in the same State.

In Ex parte Boyer (109 U. S. 629), decided in 1883, it was held that admiralty had jurisdiction of a suit *in rem* against a steam canal boat, to recover damages caused by a collision between her and another canal boat, while the two boats were navigating the Illinois and Lake

Michigan canal, four miles from its Chicago end, in Cook county, Ill., although the libellant's boat was bound from one place to another in the same State, Illinois.

The waters of the canal were held to be public waters of the United States, and within the legitimate scope of the admiralty jurisdiction, though the canal was an artificial one, and wholly within the State of Illinois.

In Matter of Garnett (141 U. S. 1) it was held that the laws of limited liability, as a part of the maritime law of the United States was in force upon navigable rivers above tide water, and applied to enrolled and licensed vessels exclusively engaged in commerce on such rivers. In that case the Katie was a steamer engaged in the carrying trade between Augusta and Savannah, both upon the Savannah river and in the State of Georgia.

The Court among other things said:

> "It being clear, then, that the law of limited liability of ship owners is a part of our maritime code, the extent of its territorial operation * * * cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that, by the settled law of this country, extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith. (Citing many cases). It being established, therefore, that the law of limited liability is part of the maritime law of the United States, it only remains to determine whether that law may be applied to navigable rivers above tide water such as the Savannah river, and to vessels engaged in commerce on such a river like the steamboat Katie in this case. Of this there can be no doubt whatever. The question has been settled by a long course of decisions, some of which are here referred to. (Citing many cases). In all of these cases it was held that the admiralty and maritime jurisdiction granted to the Federal government by the Constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers. In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single State."

The Court quotes from the case of The Belfast (7 Wall. 624), as said by Mr. Justice Clifford,

> "Navigable rivers which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself."

These are the latest expressions of the Supreme Court of the United States upon this subject to which our attention has been called, or that we have been able to find, and, if followed by this court, they are decisive of this appeal.

Our attention is called to several cases in the Court of Appeals in this State, but none of them were decided later than 1880, and so far as they are in conflict with the clearly expressed decisions of the higher court they should be regarded as overruled. The controlling consideration in this case, under the decisions hereinbefore referred to, is that the canal boat in question was a boat navigating not only the Erie canal, but the Hudson river. This river is a public navigable one, and empties into the sea in New York harbor. It is not entirely within the State of New York, but touches the State of New Jersey as well. Its waters cannot be said to be inland waters of the State of New York merely. Clearly, in view of this consideration, under the authorities referred to, the contract was maritime in its nature.

The courts of this State, therefore, had no jurisdiction of this proceeding, and the order appealed from should be reversed, with costs of the appeal to the appellant, and motion granted with ten dollars costs.

Laughlin, J., concurred.

Order affirmed with ten dollars costs and disbursements.